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November 21, 1991

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Federal Communications Commission
Office of the Secretary

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 91-221

Dear Ms. Searcy:

On behalf of Univisa, Inc., I am transmitting herewith an original and five copies of its Comments in the above-referenced proceeding.

If you have any questions concerning this matter, please contact the undersigned.

Very truly yours,

Lynn Crakes

Lynn M. Crakes

Enclosures

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Policy Implications of the Changing Video Marketplace	)	MM Docket No. 91-221

To: The Commission

COMMENTS OF UNIVISA, INC.

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Its Attorneys

November 21, 1991

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Summary

Univisa urges the Commission to consider the public interest benefits associated with expanded alien participation in the U.S. broadcast industry in exercising its discretion under Section 310(b)(4). The current restrictions impair broadcasters' ability to compete with other modes of video delivery. Domestically, opening the television broadcast marketplace to expanded alien participation will provide broadcasters with additional sources of capital investment, thus permitting broadcasters to compete with other domestic video delivery systems on even ground. Internationally, U.S. broadcasters are well-positioned to take advantage of the new and expanding opportunities that exist abroad, if U.S. domestic policy does not restrict them from participating in those other markets.

The current technologically advanced state of broadcasting, the breadth of competitive video alternatives available to the U.S. public, as well as the existence of the global communications market, have rendered the alien ownership restrictions anachronistic and unnecessary. These developments in the communications marketplace, which have occurred since the enactment of Section 310(b), have also rendered it constitutionally suspect. The alien ownership restrictions impair the rights to freedom of speech and expression of a distinct class of persons who are entitled to express their views in this country. They also limit the airing of information, commentary, and ideas to which the public is

entitled, thus restricting the diversity of voices with access to the airwaves. Because Section 310(b) as currently formulated is not the least restrictive means available to serve the governmental interest, the alien ownership restrictions would seem to violate both the First Amendment and the concept of equal protection under the Due Process Clause of the Fifth Amendment.

Univisa recommends that the Commission, in exercising its discretion under Section 310(b), allow increased foreign ownership for nationals of countries which give U.S. companies equivalent access to their communications markets. To this end, for example, the Commission should afford special treatment to our most favored trading partners, particularly in connection with the current negotiations for a North American Free Trade Agreement. The U.S. broadcasting industry would clearly benefit, both domestically and internationally, from such an approach to evaluating alien participation in broadcasting under Section 310(b).

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Policy Implications of the Changing Video Marketplace	)	MM Docket No. 91-221

To: The Commission

COMMENTS OF UNIVISA, INC.

Univisa, Inc. ("Univisa"), by its attorneys, hereby submits its comments with respect to the Notice of Inquiry in the above-captioned proceeding, 6 FCC Rcd 4961 (1991) ("Notice"), which seeks wide-ranging comments with respect to changes in the video marketplace.

I. Introduction

Univisa is a domestic corporation with its principal place of business in Los Angeles, California. Through its division, Galavision, Univisa provides Spanish-language programming to affiliate cable television systems and television broadcast stations throughout the United States. Through another division, Univisa also distributes syndicated Spanish-language programming to non-affiliated U.S. cable systems and television stations.

Univisa is a wholly-owned subsidiary of Grupo Televisa, S.A. de C.V. ("Televisa"), a company incorporated under the laws of the Republic of Mexico. Televisa's

shareholders, directors and officers are currently Mexican citizens; however, Televisa is contemplating the sale of up to twenty-five percent of its ownership to investors worldwide, including investors in the United States, through a private placement. The programming distributed by Univisa is produced by Televisa, the leading producer of Spanish-language programming in the world, which also owns and operates television and radio broadcast stations and programming networks in Mexico.[1/]

In the Notice, the Commission solicits comments on changes in the video marketplace and the public policy implications that flow from these changes. The Commission expresses justifiable concern that its rules and policies may be outdated, and seeks suggestions from the industry with respect to how its rules and policies can be reformulated to serve the public interest under current market conditions.

In this context, Univisa urges the Commission to reexamine the alien ownership restrictions on broadcast licenses. The current restrictions impair broadcasters' ability to compete both domestically and internationally. In addition, the restrictions place undue restraint on aliens' and domestic corporations' First Amendment and equal protection

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1/ In addition, Univisa formerly owned Univision, Inc., which was sold to a subsidiary of Hallmark Cards, Inc., in 1987. Univision was then, and is now, the largest Spanish-language programming network in the United States.

rights and are therefore constitutionally suspect. Although the Commission can only encourage Congress to reevaluate the absolute alien ownership restrictions of Sections 310(b)(1), (2) and (3) of the Communications Act of 1934, as amended, the Commission can exercise its discretion with respect to the holding company restrictions of Section 310(b)(4), and, in light of the developing global communications market, take a flexible approach in considering the public interest benefits of expanded alien participation in broadcasting.

II.
Expanded Alien Participation In The Broadcast Media Would Result In Significant Public Interest Benefits.

Sections 310(b)(1), (2) and (3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 310(b)(1), (2) and (3), prohibit aliens, foreign corporations, representatives of aliens, and domestic corporations where aliens directly own or vote more than twenty percent of the stock from acquiring or holding any broadcast, common carrier, aeronautical en route, or aeronautical fixed route radio station license. These restrictions are not subject to Commission discretion.

Section 310(b)(4), however, allows the Commission to decide whether the public interest will be served by refusal or revocation of the above licenses where a proposed or current licensee is directly or indirectly controlled by another corporation (1) of which any officer is an alien, (2) of which

more than twenty-five percent of the directors are aliens, (3) of which more than twenty-five percent of the stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or (4) which is organized under the laws of a foreign country. In exercising its discretion with respect to broadcast licenses under this Section, the Commission should consider the following public interest benefits of allowing broader alien participation in the broadcast industry.

A. Broader Alien Participation Will Increase Competition In The Domestic Marketplace.

Just as the recent infusion of foreign capital has revitalized the nation's movie production industry (i.e., Sony - Columbia Pictures; Matsushita - MCA/Universal; News Corporation - Twentieth Century Fox; Toshiba Corp./C. Itoh & Co. - Time Warner; among others), so opening the television broadcast marketplace to broader alien participation will stimulate and increase competition by providing additional sources of financing for domestic entities. This, in turn, will permit such entities to enhance and expand service to the public.

> It is the demonstrated value of th[e] market-driven process which will prove to be the best guarantee of a strong American economy in the future. Competition and open entry will produce a business environment which not only ensures we remain competitive internationally,

but which also provides Americans with an improving quality of life.[2/]

Economic experience clearly demonstrates that in the long run, protectionism is self-defeating.[3/] Trade barriers, which the alien ownership restrictions effectively are, limit competition. "[G]reater competition compels management to reform -- to become more efficient, more innovative: in short, to hone and refine its marketplace skills."[4/] The domestic communications market will therefore benefit from the increased competition of expanded alien participation in the broadcast media.

Moreover, as currently formulated, Section 310(b) makes it difficult for broadcasters to compete with other video delivery systems, such as cable.[5/] Aliens are not restricted in their ownership or involvement in cable

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2/ Remarks of Alfred C. Sikes, Chairman, Federal Communications Commission, "Globalization of the Telecommunications Market: Foreign Investment Issues," September 23, 1991, 7 (hereinafter, "Sikes, Foreign Investment Issues").

3/ Id. at 7-8.

4/ Id. at 7.

5/ Remarks of Janice Obuchowski, Assistant Secretary of Communications and Information, U.S. Department of Commerce, "Media Globalization: From Prophecy to Fact of Life," September 13, 1991, 5 (hereinafter, "Obuchowski, Media Globalization").

systems,[6/] but they are in broadcasting. In addition, unlike broadcasters, cable operators have dual revenue streams. As the Notice states, broadcasters rely almost exclusively on advertising as their revenue source, while cable can rely on subscription fees as well as advertising. Notice at 4962. Relaxation of the alien ownership restrictions would therefore help even the playing field by providing broadcasters with new and additional sources of capital investment already available to cable operators, thus allowing broadcasters to compete more effectively with cable and other video delivery systems and assisting in revitalizing the broadcast industry.

B. Expanding Alien Participation Domestically Will Open New Markets For U.S. Broadcasters Abroad.

Communications regulation today must recognize global economic realities. "It is essential that we understand that the communications business today is rapidly becoming as internationalized as those other traditional hallmarks of commercial 'globalism': namely, banking and finance and the

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6/ As noted, Toshiba Corp. and C. Itoh & Co. recently agreed to purchase 6.25% each of a new Time Warner subsidiary which will hold all of that company's U.S. movie production, programming and cable interests. This agreement will help alleviate some of Time Warner's significant debt. "Japan's Billion For Time Warner," Broadcasting, November 4, 1991, at 27-28.

entertainment business."[7/] Univisa urges the Commission to act on this understanding and take the lead in the international community in fostering a global communications industry, free from national barriers.[8/] With the worldwide trend toward privatization of broadcasting, opportunities for U.S. broadcasters exist that never existed before.[9/] U.S. broadcasters -- well-versed in democratic and capitalistic traditions -- are well-positioned to participate in an "open entry" environment and compete for these new opportunities, if U.S. policy is implemented in a way that ensures U.S. broadcasters' international competitiveness.

In order for U.S. broadcasters to enter and compete in other markets, however, the U.S. mass media marketplace must also be available to foreigners on a reciprocal basis. The current restrictions therefore impair U.S. broadcasters' ability to compete internationally. Nonetheless, the Commission can promote the United States television industry's place in this growing international communications market by

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7/ Sikes, Foreign Investment Issues at 7.

8/ In addition, the relaxation of the alien ownership restrictions will promote international cultural exchange. "Our goal should be a dual one: to enjoy the culture we inherit, but also to link hands in a universal global culture . . . ." Remarks of Commissioner Ervin S. Duggan, Federal Communications Commission, "Fear of Flying: The Tasks of Building a New World Communications Order," November 14, 1991, 6 (hereinafter, "Duggan, New World Communications Order").

9/ Obuchowski, Media Globalization at 10.

taking a proactive stance and exercising its discretion under Section 310(b)(4) in favor of broad alien participation, at least to the extent that the laws of foreign countries allow equivalent access to American companies.[10/] The political and economic benefits to be derived from a more open outlook with respect to alien involvement in the U.S. broadcast industry should be considered fully by the Commission when making determinations under Section 310(b), particularly in view of the legislative history of this statutory provision.

III.
The Alien Ownership Restrictions Of Section 310(b) Are Anachronistic And Unnecessary.

In making its determinations under Section 310(b), and particularly in evaluating its discretionary authority under Section 310(b)(4), the Commission must bear in mind that the alien ownership restrictions were enacted in "another technological and commercial era . . . when there were far fewer stations and radio was the only show in town . . . ."[11/] Limits on foreign investment in U.S. companies are rooted in national security concerns that "no longer exist" and should

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10/ As Commissioner Duggan has stated, "If we are [visionaries], I have no doubt that we can confound the pessimists, defy the odds -- and build a global communications structure that truly promotes one world, free and prosperous." Duggan, New World Communications Order at 7.

11/ Sikes, Foreign Investment Issues at 4-5.

therefore be reexamined.[12/] In today's global community and technologically advanced market, "the foreign ownership rules are a solution in search of a problem."[13/]

In this regard, it is critical to understand that Section 310(b) does not reflect a general policy against foreign involvement in the ownership or management of United States communications facilities.[14/] The alien control provisions of Section 310(b) were "primarily based 'upon the idea of preventing alien activities against the Government during the time of war.'"[15/] Although the Commission has on occasion described the purpose of Section 310(b) in broader terms, such as generally to protect U.S. broadcasting from

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12/ Chairman Alfred Sikes before the Center for Strategic & International Studies, as reported in Communications Daily, November 7, 1991, at 3.

13/ Obuchowski, Media Globalization at 7.

14/ Ventura Broadcasting Co. v. F.C.C., 765 F.2d 184, 194 (D.C. Cir. 1985) (affirming award of integration credit for alien 14.5% owner); Foreign Ownership of CATV Systems, 77 F.C.C.2d 73, 80-81 (1980) (refusing to place alien ownership restrictions on cable operators).

15/ Noe v. F.C.C., 260 F.2d 739, 741 (D.C. Cir. 1958) (quoting 68 Cong. Rec. 3037 (1927)), cert. denied, 359 U.S. 924 (1959); Coalition for the Preservation of Hispanic Broadcasting v. F.C.C., 931 F.2d 73, 79 (D.C. Cir. 1991) ("Committee hearings on the matter focused largely on keeping the airwaves available for military use in time of war, and only secondarily on the hazards of alien propaganda." (citations omitted)).

foreign influence,[16/] a thorough examination of the history of Section 310(b) and its predecessor provisions demonstrates that wartime security concerns were the sole impetus behind the initial alien control provisions.

The Radio Act of 1912, the first of three statutes to provide for the overall regulation of radio, limited the grant of radio licenses to American citizens and domestic corporations.[17/] The citizenship requirements were based on concerns over potential transmissions to other countries by foreign agents, especially in time of war or strained international relations.[18/] The focus of the restrictions in the 1912 Act was ship-to-shore and transoceanic point-to-point, non-voice communications.

Radio had begun as an exclusively maritime operation, and the U.S. Navy sought to retain full control over it in the period just prior to the advent of broadcasting when the

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16/ See, e.g., Wilner & Scheiner, 103 F.C.C.2d 511, 516-17 (1985), clarified in part, 1 FCC Rcd 12 (1986); Avco Broadcasting Corp., 23 F.C.C.2d 659, 660 (1970).

17/ Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302.

18/ Radio Communication: Hearings on H.R. 15357 Before the House Comm. on the Merchant Marine and Fisheries, 62d Cong., 2d Sess. 70 (1912) (statement of Lieut. Commander David W. Todd, U.S. Navy); Radio Communication: Hearings on S. 3620 and S. 5334 Before the Subcomm. of the Senate Comm. on Commerce, 62d Cong., 2d Sess. 9, 36 (1912) (statement of Lieut. Commander Todd).

critical provisions originated.[19/] Failing to persuade Congress that it should retain such control, the Navy nevertheless sought to achieve a dominant international position for American commercial radio and thereby counteract foreign dominance in international telegraph, cable and telephone. Immediately following World War I and continuing well into the twenties, the national mood was one of political isolationism and economic nationalism. The Federal Government supported the desire of American businesses and press associations for international communications facilities free of foreign domination.

A new Radio Act, creating the Federal Radio Commission, was enacted in 1927.[20/] Section 12 of the 1927 Act, from which the current alien ownership provisions were derived, was largely drafted by three U.S. Navy officers. The citizenship requirements of Section 12 are in fact identical to those of Sections 310(a) and (b) of the current statute, except that the earlier act lacks a holding company provision (the addition of which is discussed below) and, with reference to twenty percent of a licensee's stock, contains the phrase "may

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19/ In fact, the first U.S. broadcast station, KDKA(AM), Pittsburgh, Pennsylvania, was not licensed until 1921. The alien ownership restrictions thus did not even initially apply to broadcasting.

20/ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

be voted by" aliens, instead of the present "is owned of record or voted by" aliens.

Following enactment of the 1927 legislation, an issue surfaced as to licensees who complied with the specific statutory requirements for aliens, but who were controlled by large corporations or holding companies as to whom no such limitations were imposed.[21/] Once again, the concern was over subversive alien activities during times of war. The proponents of a holding company restriction claimed that the lessons of the world war required the removal of any alien influence in American commercial communications, to promote readiness for a future war.[22/] The stations necessary to

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21/ It should be noted that broadcasting was not the issue in these initial debates regarding holding companies. The object of the attack was the international conglomerate International Telephone and Telegraph Co. ("ITT"), which had several alien directors. To Amend the Radio Act of 1927: Hearings on H.R. 7716 Before The Senate Comm. on Interstate Commerce, 72d Cong., 1st Sess. 15-16 (1932) (statement of Senator White) (hereinafter, "H.R. 7716 Hearings"). ITT was a common carrier, not a broadcaster. In this connection, the Commission Staff has on occasion asserted that Congress' concern over alien influence is less in the common carrier context than in broadcasting. See, for example, Data General Corp. and Digicom, Inc., 2 FCC Rcd 6060 (Domestic Facilities Division, 1987). This is simply incorrect. The concerns with respect to alien transmissions during war were with common carriers such as ITT, as well as ship-to-shore and transoceanic non-voice communications -- not with radio or television broadcasting stations.

22/ Federal Communications Commission: Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 165-166, 170-71 (1934) (statement of Captain S.C. Hooper, U.S. Navy); H.R. 7716 Hearings at 31-33 (statement of Captain Hooper).

promote readiness for another war were, presumably, the transoceanic commercial point-to-point radiotelegraph stations.

In 1934, President Roosevelt urged immediate Congressional action to transfer the communications regulation functions of the Federal Radio Commission and the Interstate Commerce Commission to a new Federal Communications Commission. In enacting the Communications Act of 1934, Congress supplemented the 1927 Act's alien ownership provisions by adding the current holding company restriction and, with respect to the ban on alien stock ownership of more than twenty percent, changed "may be voted by" aliens to "is owned of record or voted by" aliens. The language was apparently intended "to guard against alien control and not the mere possibility of alien control."[23/]

The twenty-five percent benchmark with respect to alien stock ownership in a licensee's parent company was suggested by ITT.[24/] No specific justification for twenty-five percent was given. It appears that the limit could have just as easily been thirty, forty or even forty-nine percent. The last clause of the holding company provision, permitting the Commission to waive the holding company requirements if it found it would be in the public interest to do so, was added by

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23/ S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934).

24/ H.R. 7716 Hearings at 44 (statement of Frank C. Page, Vice President, ITT).

a conference committee, and is not discussed in the legislative history.25/

The original concerns behind the statutory alien control restrictions -- suppressing subversive communications during wartime, and breaking the foreign dominance of international communications facilities -- are concerns reflective of the technological infancy of radio communications, and of the dependence of the military on radio in its then unsophisticated state. The current technologically advanced state of broadcasting with its international capabilities renders the alien ownership restrictions anachronistic and unnecessary. A more flexible approach on the part of the Commission to alien participation in the broadcast media is therefore justified.

This is particularly so given the breadth of competitive video alternatives available to the U.S. public. "Economic and technological developments over the past 15 years have vastly expanded the array of video choices available to

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25/ Later changes in Section 310 are not material. However, the legislative history of a 1974 change incorrectly states that the section was originally intended to prevent alien control in the broadcast and common carrier fields in particular. H.R. Rep. No. 1423, 93d Cong., 2d Sess. 3 (1974). The accompanying 1974 amendments reflect this view, exempting all but broadcast, common carrier, and certain aeronautical licensees from the statute's reach.

the American public."[26/] According to the OPP Paper, ninety-four percent of television households are in markets with five or more television stations.[27/] Fifty-three percent have ten or more.[28/] Nationwide, there are currently over ten thousand radio stations, almost fifteen hundred television stations, 53.9 million cable subscribers,[29/] eight broadcast networks and over 100 cable networks. In addition, as the Commission has repeatedly observed,[30/] the expansion of multi-channel multi-point distribution services, direct-to-home satellite services and video cassette recorders is further increasing the number of voices in all markets. If fear of foreign propagandizing was ever a legitimate governmental concern, it should no longer be in view of the depth and diversity of the American video marketplace.

26/ Office of Plans and Policy Working Paper No. 26, Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996, 4104 (1991) (hereinafter, "OPP Paper").

27/ Id. at 4012-4014. These percentages are of households in Arbitron Areas of Dominant Influence (ADIs), not of total U.S. households. In 1990, 99.1 percent of all U.S. households were ADI households. Id.

28/ Id.

29/ "Summary of Broadcasting & Cable," Broadcasting, November 4, 1991, at 75.

30/ See, e.g., OPP Paper at 4058, 4065; Competition, Rate Deregulation and the Commission's Policies relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5014-5020 (1990).

IV.
The Constitutional Implications Of The Alien Ownership Restrictions Should Be Considered When Determining What Is In the Public Interest Under Section 310(b)(4).

In implementing a more flexible approach to public interest determinations under Section 310(b)(4), the Commission should also recognize that -- under the state of law that has developed since the birth of this statutory provision -- the alien ownership restrictions have become constitutionally suspect. Not only do they impair the rights to freedom of speech and expression of a distinct class of persons who are entitled to express their views in this country, the restrictions limit the public's access to a diversity of viewpoints.

While Section 310(b) is seemingly content-neutral on its face, it imposes significant incidental restraints upon the rights to freedom of speech and expression which are guaranteed to both aliens and corporations. By limiting an alien's ability to own and participate in a U.S. broadcast licensee, Section 310(b) effectively limits an alien's access to the broadcast spectrum, and thus restricts his freedom of speech and expression.[31/]

31/ See National Black United Fund, Inc. v. Devine, 667 F.2d 173, 179 (D.C. Cir. 1981) ("A rule that substantially impairs the ability of certain groups to convey their message to a desired audience . . . effectively 'abridges speech' even if it is not intended to curtail public debate." (citations omitted)).

Where a statute imposes incidental restrictions on First Amendment freedoms, it can be upheld only if:

(1) it is otherwise within the constitutional power of the government;

(2) it furthers an important or substantial governmental interest;

(3) the governmental interest is unrelated to the suppression of free expression; and

(4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest.[32/]

Assuming that Section 310(b) satisfies the first two elements of the O'Brien test, it arguably fails to satisfy the third prong. The primary purpose behind the alien ownership restrictions of Section 310(b) is to restrict alien activities, i.e., alien propaganda or political speech, against the Government, particularly in times of war or strained international relations. It would appear, therefore, that the governmental interest is not unrelated to the suppression of free expression. Section 310(b) thus fails to satisfy the third prong of O'Brien.

Even assuming that Section 310(b) is unrelated to the suppression of free expression, it cannot be said to meet the fourth prong of O'Brien. Section 310(b) is clearly not the least restrictive means available to Congress to further its

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32/ United States v. O'Brien, 391 U.S. 367, 377 (1968).

interest in preventing alien activities against the Government during time of war.

In fact, a less restrictive means of limiting alien activities during war already exists. Section 706(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 706(c), already protects the governmental interest without unduly burdening First Amendment rights. Section 706(c) grants the President the power, upon proclamation of war or other national emergency and if deemed necessary in the national interest, to seize or close any or all radio stations within the jurisdiction of the United States. This provision, which has been in place since the Radio Act of 1912, serves the Government's interest in a more precise and much less restrictive fashion than does Section 310(b) in its present form. Accordingly, because a less restrictive means exists, Section 310(b) fails to meet the fourth prong of the O'Brien test, and thus appears to be unconstitutional under the First Amendment.

Univisa recognizes that the Supreme Court has tolerated a greater degree of conflict with traditional First Amendment freedoms in the broadcast area than with respect to other forms of communication due to the limited nature of the broadcast spectrum. Nonetheless, the Court has been careful to point out that the thrust of these restrictions has been to secure the public's First Amendment interest in receiving a

balanced presentation of views on diverse matters of public concern.[33/] The Court has further stated that such restrictions "have been upheld only when [the Court is] satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."[34/] Section 310(b) fails to serve such an interest. Rather, Section 310(b) limits the class of persons who are entitled to express their views in this country,[35/] and thus restricts the airing of information,

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33/ F.C.C. v. League of Women Voters of California, 468 U.S. 364, 380 (1984).

34/ Id. (citations omitted).

35/ Apart from the First Amendment issue, Section 310(b) also appears to violate the concept of equal protection implicit in the Due Process Clause of the Fifth Amendment. As stated above, Section 310(b) restricts a distinct class of persons from expressing their views. The question is therefore whether the restriction is a permissible one. In Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976), the Supreme Court struck down a Puerto Rican statute on equal protection grounds, where the statute permitted only U.S. citizens to practice privately as civil engineers. The Court held that, although federal, state, territory and local governments may be allowed some discretion is deciding when aliens may receive public benefits or utilize public resources on the same basis as citizens, the governmental interest claimed to justify the discrimination must be carefully examined in order to determine whether (1) that interest is legitimate and substantial, and (2) the means adopted to achieve the goal are necessary and precisely drawn. Id. at 605. Assuming that the government has a legitimate interest in restricting improper alien control over broadcast licenses during war -- which Univisa believes it does -- Section 310(b) is neither necessary nor precisely drawn to further

(Footnote continued on next page)

commentary, and ideas to which the public is entitled. Because Section 310(b) limits the public's First Amendment right to receive a diversity of viewpoints over the airwaves, and burdens the First Amendment interest of aliens to freedom of speech and expression, the Commission should construe the alien ownership restrictions narrowly and implement its waiver discretion flexibly.

Similar to the constitutional concerns raised by Section 310(b)'s application to today's video marketplace, the alien ownership restrictions also impair the Commission's fundamental goal of promoting a diversity of viewpoints in the broadcast industry. As the existence of the Commission's multiple ownership rules acknowledge, the ownership of broadcast facilities is related to the expression of ideas.[36/]

(Footnote continued from previous page)

[35/] the governmental interest. The existence of the President's wartime power under Section 706(c), described above, indicates that Section 310(b) is not necessary to restrict alien broadcast activities against the government during wartime. Furthermore, Section 310(b), which restricts alien ownership at all times in order to protect against alien influence during war, is clearly overbroad. Thus, in addition to violating the First Amendment, the alien ownership restrictions as currently formulated would seem to violate equal protection under the Due Process Clause of the Fifth Amendment.

[36/] See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, 4 FCC Rcd 1741, 1743 (1989) ("One of the structural purposes underlying all of our multiple ownership rules is to encourage diversity in the ownership of broadcast stations so as to foster viewpoint diversity.").